

DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

RECEIVED

DEC - 9 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
Amendment of Section 73.202(b) )  
Table of Allotments, )  
FM Broadcast Stations, )  
Key Colony Beach, Key Largo and )  
Marathon, Florida )

MM Docket No. 93-136  
RM-8161

To: Chief, Allocations Branch

**JOINT REPLY**

Amaturo Group, Ltd. ("Amaturo"), licensee of WPBZ(FM) (formerly WOKC-FM), Indiantown, Florida; WSUV, Inc. ("WSUV"), licensee of WROC(FM), Fort Myers Villas, Florida; and Jupiter Broadcasting Corporation ("JBC"), permittee of WJBW(FM) (formerly WADY(FM)), Jupiter, Florida (collectively "Commenters"), by their attorneys, hereby submit their reply to the Opposition to Petition for Reconsideration filed by Spanish Broadcasting System of Florida ("SBSF").<sup>1</sup>

**BACKGROUND**

In a timely filed petition for reconsideration of the Allocation Branch's Report and Order in this proceeding, Commenters argued that the Branch had incorrectly dismissed their joint counterproposal without consideration on an inapplicable procedural technicality.<sup>2</sup> Specifically, Commenters argued that the policy under which the Joint Counterproposal was found defective was

---

<sup>1</sup> SBSF filed its Opposition on November 4, 1994. Joint Commenters thereafter requested an extension of time until December 9, 1994 in which to file this Reply.

<sup>2</sup> SBSF incorrectly argues that Commenters' petition, submitted within 30 days of publication of the FCC's Report and Order in the Federal Register was untimely. In fact SBSF concedes that the FCC has previously rejected an argument that the due date for such filings in FM allotment cases should be calculated from the earlier release date of the Report and Order itself. Prineville and Sisters, Oregon, 8 FCC Rcd 4471 (1993).

No. of Copies rec'd  
List ABCDE

044

neither intended to apply to counterproposals, nor did it explicitly require that reimbursement statements be made as of the date of filing of a counterproposal. Commenters further observed that even if such policy were applicable to counterproposals, its stated purpose would not require dismissal where the minor procedural omission was promptly corrected prior to the close of the record, and no harm resulted from such omission. Commenters concluded that, in light of the relative merits of the proposals, it was contrary to the public interest, and the Commission's fundamental Congressional mandate, for the Allocations Branch to inappropriately and strictly apply a minor procedural rule in a manner that served no stated administrative goal, while effectively preventing 1,400,000 persons from receiving additional new service.

Such a conclusion was made even more apparent given the availability of a solution on the record that would have allowed all parties to achieve their stated goals. Commenters also argued that the Branch's grant of SBSF's proposal and its required forced channel changes were inappropriate given the insufficient evidence of intermodulation interference provided by SBSF, the presence of alternative and less drastic solutions, and the numerous misrepresentations of fact made by SBSF on the record. In its opposition SBSF, self-servingly but unsuccessfully attempts to find fault with Commenters' arguments.

#### **I. DISMISSAL OF COMMENTERS COUNTERPROPOSAL WITHOUT CONSIDERATION CONSTITUTED ERROR**

In its opposition, SBSF incorrectly argues that the reimbursement statement policy enunciated in Brookville and Punxatawney, Pennsylvania, 3 FCC Rcd 5555 (1988), not only applies to counterproposals, but that such statements must be made as of the date the counterproposal is filed. However, as noted in the

Petition, such a conclusion is unsupported by the facts. The Brookville case and the policy pronouncement therein dealt specifically with "competing expressions of interest" and not "counterproposals." SBSF without further explanation argues simply that "elemental fairness and sound procedural constraints" demand that the Brookville policy apply to counterproposals.

SBSF also disregards the fact that the policy set forth in Brookville did not specifically require that competing expressions contain the reimbursement pledge "when filed," and did not state that an omitted reimbursement pledge could not be cured before the close of the pleading cycle. Instead, SBSF states that a separate Commission policy inflexibly requires that counterproposals, like initial rulemaking proposals, be technically correct and substantially complete when filed.<sup>3</sup> However, SBSF offers no evidence that the Commission inflexibly requires counterproposals to be letter perfect without regard to the nature of the omission. Indeed SBSF concedes that in Neenah-Manesha, Rhinelander and Rudolph, Wisconsin, 7 FCC Rcd 4594 (1992), the presence of a technical defect in a proposal did not warrant the proposal's dismissal because the applicant and the Commission itself had cured the defect.

SBSF further fails to appreciate the significance of the Neenah-Menesha decision. In that case, the technical defect at issue was also one that derived from the policy espoused in the

---

<sup>3</sup> SBSF's reliance on El Dorado and Lawton, Oklahoma, as evidence of a letter perfect standard for counterproposals is misplaced. As with cases cited by the Allocations Branch El Dorado involved a "major technical defect" that would otherwise violate Commission rules and render a proposal ungrantable. In that case, the counterproposal failed to show that an allotment could be made consistent with the Commission's spacing rules. 5 FCC Rcd 6737 (1990).

Brookville case. However, in that case, given the fact that the error was promptly cured when identified by the Commission and no harm actually occurred, the Allocations Branch was willing to excuse the omission. Here, the Commenters inadvertent omission was also promptly corrected, and unlike Neenah-Menesha before such omission was called to their attention by the Commission or any other party.

SBSF also argues that the Allocations Branch's statement in East Wenatchee, Ephrata and Chelan, Washington, that a failure to make a reimbursement pledge "could result in denial of a proposal" does not signal a relaxation of the allegedly inflexible policy that a counterproposal be technically correct and substantially complete when filed. However, such an interpretation does not coincide with recent Allocations Branch decisions. In those cases, the Allocations Branch, while acknowledging that failure to comply with the requirements of Section 1.52 of its Rules "can constitute grounds for dismissal" has allowed petitioners to cure omissions in their proposals.<sup>4</sup>

In Cavalier, the Allocations branch excused the omission of a verification statement even after the proponent failed to comply with a specific Commission request that it correct the defect and

---

<sup>4</sup> Section 1.52 of the Commission's Rules requires that allotment proposals and counterproposals filed by persons not represented by an attorney must be signed, verified, and accompanied by the proponent's address. These decisions were also made with full knowledge that the Commission has specifically stated, in light of the fact that such rule ensures accountability of those filing pleadings with the Commission, "it should be strictly enforced in allocations proceedings." Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes, 5 FCC Rcd 3911, 3919, n.41 (1990). See e.g. Wewoka, Oklahoma, DA 94-1254, released November 17, 1994; Woodville, Mississippi, Clayton and Jena, Louisiana, DA 94-1047, released October 4, 1994; Cavalier, North Dakota, DA 94-1040, released October 3, 1994.

supply the omitted materials in its comments. Such a decision was based on the lack of harm to other parties and on the merits of the proposal itself.<sup>5</sup> While the merits in Cavalier involved the provision of a first local service, here, a grant of the counterproposal would enable 1.4 million people to receive additional service, while still enabling the Commission to resolve SBSF's alleged problem through an alternative solution previously advanced on the record.

SBSF argues that a strict enforcement of the Brookville policy to counterproposals serves the goal of avoiding prejudice to competing parties. However, as pointed out by Commenters in the Petition, the goal underlying the reimbursement pledge policy was not to ensure that competing parties would have an opportunity to comment on reimbursement commitments, but rather to avoid delay by assuring that all parties expressing interest in another's proposal are aware of, and have acknowledged, their obligation to reimburse stations involuntarily moved to other channels prior to the time the Commission would be called upon to evaluate competing expressions of interest.<sup>6</sup> Furthermore, neither SBSF nor Sterling, the party most directly affected by the omission, has ever alleged that it was actually prejudiced by the partial omission. In fact,

---

<sup>5</sup> Thus, SBSF's conclusion that the Allocations will not consider the relative merits of individual proposals when it makes decisions regarding the appropriate penalty for technical omissions, is similarly incorrect.

<sup>6</sup> Here, the omitted portion of the reimbursement statement was supplied before the close of the pleading cycle, effectively avoiding any sort of delay similar to that encountered in Brookville. However, because under the Circleville policy such reimbursement is mandatory, and Commenters had already demonstrated their understanding of such obligation at the time of filing, their partial omission could only have been an oversight, and if such policy were to apply to counterproposals, the purpose underlying the policy would already have been served.

because Commenters proposal was fully set forth in its counterproposal, including the requirement that WSGL change channels, SBSF and Sterling were fully able to comment on the counterproposal, including the reimbursement issue.<sup>7</sup>

Thus, given the relative merits of the proposals, the availability of a universal solution, the lack of any actual prejudice, and the fact that the minor omission was promptly corrected prior to the close of the record, it would be arbitrary and capricious for the Allocations Branch to inappropriately and strictly apply a minor procedural rule in a manner that does not serve its stated purpose.

## **II. THE GRANT OF SBSF'S PROPOSAL CONSTITUTED ERROR**

In its opposition SBSF also takes issue with Commenter's contention that evidence provided by SBSF concerning intermodulation interference to WCTH(FM) was insufficient to warrant a change in the table of allotments especially where such change involves involuntary modifications to two other stations, and an alternative solution is available.<sup>8</sup> In its defense, SBSF alleges that it has supplied the commission with a wealth of information regarding the alleged interference. However, as pointed out in the Petition, SBSF provided no test measurement data demonstrating or even suggesting the presence of intermodulation; nor did it supply letters from listeners detailing the seriousness

---

<sup>7</sup> Specifically, in reply comments, Sterling stated that it was not opposed to the change, and that the omitted statement was an inadvertent oversight which could easily be remedied.

<sup>8</sup> In its reply comments Vero Beach observed that to eliminate the alleged interference SBSF could simply move its facilities and remain on its existing channel, thereby avoiding the expense and inconvenience of involuntary channel changes for WKKB and WAVK.

of the problem. Instead SBSF provided a self-serving statement from its own station engineer vaguely stating that some informal tests were done by himself and that others had been performed by a third party engineer, and that intermodulation was observed.

Defensively, SBSF argues in its Opposition that more detailed spectrum plots demonstrating the potential for interference, while not provided in this proceeding, were provided with its license application (BALH-930427KA). However, the study referred to by SBSF clearly states that "no detectible emission was found at 100.3 MHz [WCTH's frequency] to a level 89 dB below WZMQ's unmodulated reference carrier level."<sup>9</sup>

### **III. SBSF'S RECORD OF MISREPRESENTATION IN THIS CASE REQUIRED FURTHER INQUIRY PRIOR TO ANY DECISION ON THE MERITS**

Given the presence of repeated misstatements of fact concerning the merits of this proceeding, which were made on the record by SBSF, and which may be independently verified within its own pleadings, Commenters argued that the Allocations Branch was incorrect to grant SBSF's proposal and terminate the proceeding without further inquiry. In its Opposition, SBSF's further lack of candor only strengthens Commenter's argument.

In its Opposition, SBSF concludes that in an effort to de-emphasize the unsuitability of a proposed Sanibel Island reference site, Commenters discuss, but fail to amend their counterproposal

---

<sup>9</sup> As noted previously low levels of interference are often observed within close proximity of broadcast towers, and do not warrant the sort of relief requested by SBSF. Furthermore, consistent with Commenters' prior observation that the alleged RITOI problem appears to be of more importance to SBSF than to the station allegedly receiving interference, it is instructive to note that WCTH filed no petition to deny or even a comment concerning SBSF's above -referenced license application, even though such application was filed a full four months after SBSF submitted its request for rulemaking in this proceeding on the basis of WCTH's RITOI problem.

to specify an alternate albeit equally unworkable reference site. However, SBSF fails to note that such an amendment was not necessary, in no small part because Commenters have never altered their position that their original reference site on Sanibel Island is suitable.<sup>10</sup> Furthermore, SBSF fails to mention that any discussions of alternative sites on Punta Rassa were included for the purpose of responding to misrepresentations made on the record by SBSF. Contrary to its own engineering studies, and frequent corrections by Commenters, SBSF repeatedly and incorrectly stated that the only possible location for such reference site is on Sanibel. To overcome this misrepresentation, Commenters identified reference coordinates on Punta Rassa that had previously been used by the Commission. When SBSF argued that such coordinates lay offshore, Commenters submitted other coordinates on Punta Rassa that would also work.<sup>11</sup>

SBSF attempts to cloud the issue regarding its misrepresentations concerning an alleged underserved loss area for WAFC-FM by belatedly admitting that it incorrectly attributed

---

<sup>10</sup> Notwithstanding its submission of an engineering statement and a series of photographic exhibits designed to mislead the Commission, SBSF in its Opposition essentially concedes that Commenters' Sanibel reference site does not in fact lie within a specifically designated conservation area. Instead, SBSF attempts to infer that Commenters location of a tower nearby and use of a public road would somehow impact the adjacent conservation area. Such self-serving statements do not establish the unsuitability of the proposed site.

<sup>11</sup> SBSF fails to address the additional misrepresentations identified by Commenters regarding other possible Punta Rassa reference sites. To refute statements by SBSF that Punta Rassa is a swamp devoid of existing broadcast towers, Commenters have previously submitted documentation, including photographic evidence, demonstrating not only that such area is not a swamp, but that it in fact contains numerous high rise buildings, a world class resort, and several roof mounted antenna masts. Joint Reply to Opposition, at p. 5-10 and exhibit 2, attachments 1-8.



numbers to WAFC that should have been attributed to WPBZ(FM) (formerly WOKC-FM) and conceding that any referenced WAFC loss area would in fact occur completely over water. With regard to the alleged loss of service from a grant of WPBZ's proposal, none would occur. As noted in its Petition, WPBZ has filed a license application for, and is currently operating as a C2 facility at Indiantown, Florida. Whereas, WPBZ's proposed service would completely encompass any current operation, no actual loss of service would occur.

The Commission has previously stated that adverse findings have been made with regard to an applicant's qualifications if the applicant "tries to create impressions designed to mislead the Commission." See RKO General, Inc., 47 R.R. 2d 921, 998 (1980). Therefore, given the numerous instances of misrepresentation, internally verifiable through an examination of SBSF's own pleadings, it was error for the Allocations Branch to disregard these allegations, grant SBSF's petition, and terminate the proceeding without further inquiry.

**CONCLUSION**

For the foregoing reasons, the decision of the Allocations Branch dismissing the Joint Counterproposal without consideration and granting SBSF's proposal constituted error and must be reversed. Wherefore, Commenters respectfully requests that their petition be granted and that their Joint Counterproposal be adopted.

Respectfully submitted,

**AMATURO GROUP, LTD.  
WSUV, INC.  
JUPITER BROADCASTING CORPORATION**

By:



Robert J. Rini  
Evan D. Carb

Their Attorneys

Rini & Coran, P.C.  
1350 Connecticut Avenue, N.W.  
Suite 900  
Washington, D.C. 20036  
(202) 296-2007

December 9, 1994

CERTIFICATE OF SERVICE

I, Rhonda Parrish, a secretary with the law firm of Rini & Coran, do hereby certify that I caused a copy of the foregoing "Joint Reply" to be mailed, first-class, postage prepaid this 9th day of December, 1994 to the following:

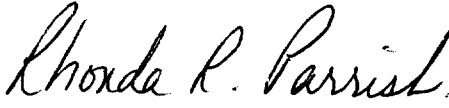
John Karousos, Esq. \*  
Acting Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 8322  
Washington, D.C. 20554

Ms. Nancy J. Walls,  
Communications Industry Analyst \*  
Allocations Branch  
Policy and Rules division  
Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 8322  
Washington, D.C. 20554

William D. Silva, Esq.  
Blair, Joyce & Silva  
1825 K Street, N.W., Suite 510  
Washington, D.C. 20006  
Counsel to Richard L. Silva

John Joseph McVeigh, Esq.  
Multinational Legal Services  
11 Dupont Circle, N.W.  
Suite 700  
Washington, D.C. 20036  
Counsel to Key Chain, Inc.

James M. Weitzman, Esq.  
Bruce A. Eisen, Esq.  
Kaye, Scholer, Fierman, Hays & Handler  
901 15th Street, N.W., Suite 1100  
Washington, D.C. 20005  
Counsel to Spanish Broadcasting  
System of Florida, Inc.

  
Rhonda R. Parrish

\* Via Hand-Delivery